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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1141

LEE ARENAS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Lee Arenas, appellee in the Court below, respectfully prays that a writ of certiorari issue to review, in part, the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on the 12th day of December, 1946. A petition for rehearing was filed by petitioner on the 10th day of January, 1947, and a rehearing was denied by said Court on the 14th day of January, 1947. The judgment of said Court is final.

Opinions Below.

The Circuit Court of Appeals for the Ninth Circuit rendered one opinion in the case, which is reported in 158 F. (2d) 730.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347(a)).

Statutes Involved.

The statutes involved are: (1) The General Allotment Act of February 8, 1887 (Ch. 119, 24 Stat. L. 388, 25 U. S. C. A., Sections 331 *et seq.*); The Mission Indians Act of January 12, 1891 (Ch. 65, 26 Stat. L. 712); (3) The Act of June 25, 1910 (36 Stat. L. 859); (4) The Act of March 2, 1917 (39 Stat. L. 969, 976); and (5) The Act of February 14, 1923 (Ch. 76, 42 Stat. L. 1246, 25 U. S. C. A., Section 335). The pertinent parts of these Acts are set forth in the Appendix.

Summary Statement.

Petitioner brought this suit in the District Court of the United States for the Southern District of California to secure a judicial determination of his right to an allotment in severalty of tribal lands in the Agua Caliente or Palm Springs Reservation of the Mission Indians of California, under Section 345 of Title 25, U. S. C. A., 31 Stat. L. 760 [R. 4-26], and also to secure a like determination of his right, as heir at law and next of kin, to allotments in severalty of said tribal lands made, respectively, to his wife Guadaloupe Arenas, to his father Francisco Arenas, and to his brother Simon Arenas, all of whom died subsequent to the 21st day of June, 1923.

Following the reversal by this Court of a former judgment in this cause (*Arenas v. United States,* 322 U. S. 419, 64 S. Ct. 1090, 88 L. Ed. 1363) petitioner filed a

Third Amended Complaint [R. 4-26] upon which, and the answer thereto [R. 26-43], the cause was retried.

The record shows, without question, that petitioner is a citizen of the United States of America and of the State of California; that he is of Indian blood and descent and is a duly enrolled and recognized member of the Agua Caliente or Palm Springs Band of Mission Indians of California; that he is of age; and that all his life has been a resident upon the Palm Springs Reservation of said Band of Indians. A like showing is made in the record in respect to Guadaloupe Arenas, Francisco Arenas, and Simon Arenas. [3rd Am. Complt., R. 4-5, 10, 14-15, 19-20; Ans. R. 27, 36, 38, 40; Admissions, R. 45.]

The record further shows that the Secretary of the Interior, acting under and pursuant to the authority and directions given him by the Act of Congress of January 12, 1891 (26 Stat. L. 712-714), as amended by the Act of June 25, 1910 (36 Stat. L. 855-865) and by the Act of March 2, 1917 (39 Stat. L. 976), on or about July 1, 1921, appointed one H. E. Wadsworth as Special United States Allotting Agent at large for the Mission Indian Reservations of California and that he authorized and directed said Special Allotting Agent to make allotments in severalty of lands situated within the Palm Springs Mission Indian Reservation to the members of said Band of Indians [R. 45-50]; that thereafter said Special Allotting Agent surveyed and classified, or caused to be surveyed and classified, the lands of the Palm Springs Band of Mission Indians, so that each Indian could be alloted 2 acres of land within or near the City of Palm Springs, 5 acres of irrigable land, and 40 acres of desert land [R. 46]; and that, on or about the 21st day of June,

1923, said Special Allotting Agent, pursuant to the authority granted to him by the Secretary of the Interior and by the applicable Acts of Congress, allotted to petitioner the lands described in the Third Amended Complaint [R. 6, 47] and in the Schedule of Allotments of said date duly made and certified by said Special Allotting Agent to the Secretary of the Interior. [R. 279.] The record further shows that said Special Allotting Agent, on or about the 21st day of June, 1923, issued and delivered to petitioner a certificate of "Selection for Allotment," as follows:

> "On Agua Caliente Indian Reservation, 1923.
>
> "This is to certify that Lee Arenas has selected the Lot No. 46, Sec. 14, Tp. 4 S., 4 E., 2 acres; Tract No. 39, de 26, do 5 do. Also the E½ SW¼ NW¼ and the E½ NW¼ NE¼ of Section 26, Township No. 4 S., Range No. 4 East of the S. B. M. containing 40 acres, more or less, according to Government survey. Stake No. .....
>
> Not valid unless approved by the Secretary of the Interior.
>
> H. E. WADSWORTH,
> U. S. Special Allotting Agent."

[R. 180-183.]

The record further shows that, on or about the 26th day of October, 1923, said Special Allotting Agent, pursuant to authority given him by the Secretary of the Interior, stated and represented to petitioner that the issuance and delivery of said certificate of allotment entitled petitioner to enter upon and take possession of the lands described therein, and that thereafter petitioner entered into the

possession of said lands, and erected thereon buildings and other permanent structures and improvements of the value of $15,000 which, but for said statements and representations, he would not have made. The record also shows that, except as to description of lands and values of the improvements placed thereon, the facts stated above as to petitioner Lee Arenas have equal application to Guadaloupe Arenas, Francisco Arenas, and Simon Arenas. [R. 45, 148, 180-183.]

The record further shows that, on or about the 8th day of January, 1927, the Secretary of the Interior Directed said Special Allotting Agent to make reallotments of the lands previously allotted only to such members of the Palm Springs Band of Mission Indians as should make their own selections for allotment [R. 529-531] and pursuant to said direction the Special Alloting Agent on or about the 9th day of May, 1927, reallotted to Lee Arenas, Gaudaloupe Arenas, Francisco Arenas and Simon Arenas, respectively, the same lands that had been alloted to them in 1923, and issued a certificate to and in the name of each of said Indians in form and content identical with the certificates issued to them on the 21st day of June, 1923. [R. 158.] The record shows that Guadaloupe Arenas died on the 26th day of March, 1937; that Francisco Arenas died on the 24th day of October, 1924; that Simon Arenas died on the 18th day of February, 1925 [R. 36, 39, 41], and that petitioner Lee Arenas is the sole heir at law and next of kin of each of said persons: [R. 49.]

Holding of the District Court.

The District Court held and adjudged that, as to petitioner Lee Arenas, Guadaloupe Arenas, Francisco Arenas and Simon Arenas, and each of them, the United States of America pursuant to the Acts of Congress specified in the judgment "did on the 21st day of June, 1923, allot * * * and on the 9th day of May, 1927, reallot" to them and each of them the lands described on the Schedules of Allotment certified and filed by the Special Allotting Agent on said dates and as described in the certificates of allotment issued to said persons in 1923 and 1927 [R. 92, 93, 94, 95], and that Lee Arenas for himself and as the sole heir at law and next of kin of Guadaloupe Arenas, Francisco Arenas and Simon Arenas "is entitled to a trust patent for each and every of the above described allotments * * * to be effective as of June 21, 1923 * * * ." [R. 95.] (Opinion, 60 F. Supp. 411.)

The United States of America appealed from said judgment, and from the whole thereof, to the Circuit Court of Appeals for the Ninth Circuit. [R. 108-109.]

Holding of the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the judgment of the District Court in respect to the allotments made to petitioner Lee Arenas and Guadaloupe Arenas under the reallotment proceedings had in 1927. But the Court reversed the judgment of the District Court in respect to the allotments and reallotments made to Francisco Arenas and Simon Arenas on the ground that "neither * * * acquired any equitable rights to a trust patent under either the 1923 or the 1927 schedule" and that "not hav-

ing any such rights * * * they could transmit none to appellee."

Petitioner complains and seeks review only of that part of the decision of the Circuit Court of Appeals which holds that he is not entitled to trust patents to the lands allotted in 1923 and reallotted in 1927 to Francisco Arenas and Simon Arenas.

Questions Involved.

1. The Act of March 2, 1917 (39 Stat. L. 969, 976) deprived the Secretary of the Interior of all policy-making discretion and power in respect to the Mission Indians in California and mandatorily directed him to cause allotments to be made to all Indians belonging to and having tribal rights on the Mission Indian Reservations in California.

2. Francisco Arenas and Simon Arenas were vested with equitable title and right to trust patents to the lands allotted to them under the applicable Acts of Congress and the allotment proceedings had in 1923.

3. The Secretary of the Interior cannot lawfully withhold an allotment trust patent from a qualified Mission Indian allottee who has an equitable right thereto.

4. Under the facts of this case the United States of America is estopped to deny petitioner's right and title to the lands allotted in 1923, and reallotted in 1927, to his father Francisco Arenas and to his brother Simon Arenas.

5. The decision of the Circuit Court of Appeals is contrary to the applicable Acts of Congress and to the decisions of this Court and other Circuit Courts of Appeals.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Act of March 2, 1917 (39 Stat. L. 969, 976) Deprived the Secretary of the Interior of All Policy-making Discretion and Power in Respect to the Mission Indians in California and Mandatorily Directed Him to Cause Allotments to Be Made to All Mission Indians Belonging to and Having Tribal Rights on the Mission Indian Reservations in California.

The historical background necessary to the discussion of this case is clearly set forth in the opinion of this Court in *Arenas v. United States*, 322 U. S. 419, 64 S. Ct. 1090, 88 L. Ed. 1363, and therefore is not repeated herein. Petitioner contends that, by the Act of March 2, 1917, Congress deprived the Secretary of the Interior of all policy-making discretion and power and peremptorily ordered him to cause allotments in severalty to be made to all Mission Indians in California belonging to and having tribal rights on their respective Reservations.

The Act of March 2, 1917 (39 Stat. L. 969, 976) provides in this behalf as follows:

> "* * * that the Secretary of the Interior be, and he is hereby, authorized and *directed*, to cause allotments to be made to Indians belonging to and having tribal rights on the Mission Indian Reservations in California * * *." (Italics ours.)

In *Arenas v. United States*, 322 U. S. 419, *supra*, this Court construed the Act of March 2, 1917, to be a *direction*

to the Secretary of the Interior to cause allotments in severalty to be made to the Mission Indians in California, saying at page 425:

> "The Act of 1917, however, drops the language of discretion and *directs* the Secretary to cause allotments to be made to the Indians on the Mission Reservations."

And in respect to discretion, if any, which the Secretary may have had under said Act this Court said, *id.*, page 427:

> "We think his conduct and words amount both to an administrative construction of the 1917 Act as a direction and to the exercise of any discretion he may have had under it. * * * Arenas is entitled to invoke the applicable legislation as it stands in determining whether he is entitled to have completed the all but fully executed policy of allotment." (*Id.*, pp. 433-434.)

II.

Francisco Arenas and Simon Arenas Were Vested With Equitable Title and Right to Trust Patents to the Lands Allotted to Them Under the Applicable Acts of Congress and the Allotment Proceedings Had in 1923.

The record shows that Francisco Arenas and Simon Arenas were of Indian blood and descent, that they were duly enrolled and recognized members of the Palm Springs Band of Mission Indians in California, and that all their lives they had resided upon the Palm Springs Reservation of said Band of Indians. [Admissions, R. 45.] Being thus fully qualified, they were entitled as of right to an apportionment of the tribal lands of said Band of Indians under the Congressional mandate expressed in the Act of

1917. (*Parr v. United States,* 153 Fed. 468; *Millet v. Bilby,* 101 Okla. 241; *Hooks v. Kennard,* 28 Okla. 457; *Reynolds v. Brooks,* 49 Okla. 468.) The selection of particular lands by or for them was not the inception of their right, but of their title thereto. (*Id.*) The allotment proceedings had in 1923 were sufficient to vest equitable title in Francisco Arenas and Simon Arenas to the lands selected for and allotted to them by the Special Allotting Agent, and they became entitled to allotment trust patents to the lands so selected and allotted.

The Special Allotting Agent was instructed by the Commissioner of Indian Affairs, with the approval of the Assistant Secretary of the Interior, to make allotments to the Mission Indians in California as follows:

> "The allotments herein authorized will be made under the provisions of the Act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the Act of June 25, 1910 (36 Stat. L., 855), and supplemented by the Act of March 2, 1917 (39 Stat. L., 969-76)." [R. 393.]

The Certificates issued by the Allotting Agent show that he followed these instructions, and the Circuit Court of Appeals held accordingly.

The instructions to the Special Allotting Agent also provided:

> "Each Indian who has reached the age of discretion should be permitted to select his own allotment, but the selections for minors may be made by the parents, if living, or by some other person whom you regard as competent to do so. Selections for orphans should be made by you.
>
> "If any Indian has acquired an equitable right to a specific tract of land by reason of occupancy, im-

provement, and use, such right should be recognized and protected as fully as possible by permitting him, or members of his family, to select such land." [R. 394.]

The Allotting Agent requested each adult Mission Indian in 1923 to make his selection of lands for allotment to him. Some members of the Palm Springs Band, including Francisco Arenas and Simon Arenas, failed to make selections as requested and the Allotting Agent made selections for them. These selections included the lands that had long been occupied, improved, and used by Francisco Arenas and Simon Arenas. No question has been made as to the fairness of the selections so made by the Allotting Agent.

The Circuit Court of Appeals held in respect to the selections thus made by the Allotting Agent for Francisco Arenas and Simon Arenas that:

> "In our view, Wadsworth had no power to do this without *specific* authorization from the Secretary of the Interior. The record fails to show that he had such authorization, nor does the appellee point to any such specific authority from the Secretary."

This statement of the Court is in obvious conflict, however, with its statement that:

> "* * * Wadsworth was *specifically* instructed by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, to make all the Mission Indian allotments 'under the provisions of the Act of Congress of February 8, 1887 (24 Stat. L., 388), as amended by the Act of June 25, 1910 (36 Stat. L., 855), and supplemented by the Act of March 2, 1917 (39 Stat. L., 969-76).' [R. 46, 393, 402,

432.] And Wadsworth followed his instructions, noting the fact on the schedule as submitted to Washington. (Original Exhibit 15.)" (Italics ours.)

It thus becomes apparent that the validity of the 1923 allotments made to Francisco Arenas and Simon Arenas depends upon the authority granted to the Allotting Agent under the foregoing instructions.

The General Allotment Act (Act of February 8, 1887, 24 Stat. L. 388), which the Allotting Agent was "specifically" instructed to follow, contains the following provisions which are pertinent in determining the extent of the authority of the Allotting Agent to select lands for allotment to Francisco Arenas and Simon Arenas:

> "All allotments set apart under the provisions of sections 331 to 334, inclusive, and 336 shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under said selection: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed

for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner." (25 U. S. C. A., Sec. 332.)

Petitioner asserts that the Allotting Agent had ample authority, under his instructions and under the foregoing provisions of the General Allotment Act, to make selections for Francisco Arenas and Simon Arenas. Only three things are necessary to exercise the power to make selections for Indians who fail to make their own selections, to-wit: (1) a Presidential direction to make allotments on a particular reservation; (2) failure of any Indian thereon to make a selection during a period of four years after the Presidential direction; and (3) direction by the Secretary of the Interior to the regular agent, or to a special agent, to make such selection.

The Congressional mandate or direction expressed in the Act of March 2, 1917 made unnecessary, and was a substitute for, any Presidential direction to make allotments to the Mission Indians. Moreover, the President's signature to and approval of that Act was, in effect, a Presidential direction. More than four years, indeed more than six years, elapsed after the Congressional direction to make allotments to the Mission Indians before the Allotting Agent made the selections in question. And, as clearly appears from the instructions given to the Allotting Agent, he was directed to follow the provisions of the General Allotment Act in making the allotments to the Mission Indians, which necessarily included the provisions in question. In the absence of any exceptions or reservations in the instructions given to the Allotting Agent, his authority and power thereunder included the

right to make selections for such of the Mission Indians as failed to make their own selections.

Under well settled principles of law governing the construction of written instruments, the instructions given to the Allotting Agent authorized and empowered him to do all things provided by the Acts of Congress specified therein, including the making of selections for allotment for Indians failng to make their own selections. In 2 C. J. S. 1226, Section 98(6) of Agency, it is said:

> "Where the agency and the written expression of its terms involve a subject matter which is affected or governed by statutes, or rules of substantive law, such rules of law, statutory or otherwise, enter into them as integral parts, and the agreement is to be construed accordingly."

Moreover, the Allotting Agent was a public administrative officer of the United States and, as such, possessed and could lawfully exercise all authority and power inhering in his office unless expressly limited in such exercise by the terms of his appointment and instructions. See 43 Am. Jur. 69, Section 250 of Public Officers, where the text states:

> "The prescription of official duties by statute or ordinance is not an exclusive test of authority, when neither express provision nor implication from the nature of the office calls for it. The duties of a public office include all those which fairly lie within its scope, those which are essential to the accomplishment of the main purposes for which the office was created, and those which, although incidental, are germane to, or serve to promote or benefit, the accomplishment of the principal purposes. * * *

> Sometimes, if there is no statute defining the duties of an office, usage and custom may be the basis of ascertaining their scope."

It must be noted that Congress by the Act of March 2, 1917, had fixed the *policy* in respect to the allotment in severalty of the lands on the Mission Indian Reservations; and by that Act had *commanded* the Secretary of the Interior to execute that policy. The policy thus fixed by Congress comprehended that allotments in severalty should be made to each and every Indian on the Mission Reservations in California entitled thereto. If the Secretary could determine that only such Mission Indians as made their own selections of land for allotment should receive allotments and trust patents, then the policy fixed by Congress would inevitably be defeated, as indeed it has been for the past thirty years in so far as the Palm Springs Band is concerned. Forces and influences within the Department itself were operating to defeat the Congressional policy, and finally procured the disapproval of the 1927 allotments on the 14th day of December, 1944 [R. 340], more than seventeen years after said allotments were made. The Allotting Agent was fully aware of the fact that opposition to the making of any allotments at all to the Mission Indians existed within the Department. [R. 148, 149.]

The Special Allotting Agent, a veteran in the Indian Service, rightly construed his instructions to mean that he was authorized and directed to make selections for Indians who failed to select for themselves. The Commissioner of Indian Affairs was of the same opinion, for upon receipt of the 1923 schedule, showing *inter alia* that the Allotting Agent had made selections for Francisco

Arenas and Simon Arenas and various other members of the Palm Springs Band of Mission Indians, the Commissioner approved said Schedule and on August 6, 1923, submitted, with his approval, to the Secretary of the Interior.

Of interest in this connection are two memoranda mentioned by the Circuit Court of Appeals. On May 31, 1924, E. B. Merritt, Assistant Commissioner, wrote to Mr. E. K. Burlew, Administrative Assistant, that:

> "At a conference in the Secretary's Office on or about November 1, 1923, the conclusion was reached to withhold final approval of the schedule." [R. 519.]

And the following notation appears on Mr. Marschalk's letter "via Mr. Hanke":

> "Action to be withheld until about Dec. 1st, 1924, by request of Secretary.
>
> T D M—9-1-1924" [R. 521.]

The Circuit Court of Appeals then pithily comments:

> "And there the record ends so far as the 1923 schedule is concerned."

It thus appears that the Secretary of the Interior took no affirmative action in respect to the 1923 Schedule. He simply withheld approval thereof. But, withholding approval for a specified period of time does not constitute disapproval.

Nothing further seems to have been done about the 1923 allotments to the Palm Springs Band until December 22, 1926. On that date Commissioner Burke wrote to the Secretary of the Interior, in part, as follows:

> "Very recently Assistant Commissioner Merritt telegraphed from Riverside, California, with respect

> to Mission allotments that 'allotments should be made to Mission Indians who desire them but not to objectors' * * * It is, therefore, recommended that this Office be authorized to *revise the schedules now pending* so as to eliminate the names and selections of those Indians who do not desire allotments at this time, and as revised to present the schedules for Departmental consideration with a view to approval and the issuance of trust patents as authorized by law." [R. 525 *et seq.*]

"Revision" of the 1923 Schedule would not necessarily constitute a disapproval thereof. Moreover, the revision was admittedly due to a change of departmental policy, for the Assistant Commissioner states in a letter to the Special Allotting Agent on January 8, 1927:

> "There is inclosed copy of Office letter dated December 22, 1926, approved by the Department January 5, 1927, *outlining the policy to be pursued* with reference to the allotments on the Mission reservations in southern California, and particularly with respect to certain schedules now pending in this Office." [R. 529 *et seq.*] (Italics ours.)

If there was any disapproval of the 1923 allotments to the members of the Palm Springs Band of Mission Indians, it is not expressed in but must be inferred from the record. Moreover, if there was any such disapproval, it was due solely to a change of policy by the Department, and not for any other reason whatsoever. But, as this Court said in *Arenas v. United States,* 322 U. S. at p. 432:

> "* * * Courts are not to determine questions of Indian land policy, *nor can the Secretary on grounds of policy deprive an allottee of any rights he may have acquired in his allotment.*" (Italics ours.)

The statement of this Court, just quoted *supra*, has peculiar application to this case, for the 1923 Schedule was not approved and the 1927 schedule was allegedly disapproved because of the setting up of departmental policy which was and is contrary to the policy fixed by Congress. Moreover, Francisco Arenas and Simon Arenas acquired equitable rights under their 1923 allotments of which they could not lawfully be deprived by the Secretary of the Interior.

Following the preparation and filing of the 1923 Schedule and the issuance of certificates of selection to Francisco Arenas and Simon Arenas, the Allotting Agent told them that "I had authority from the main office to inform them they could now go ahead and use their allotments and make use of them" [R. 162] and that it probably would be "six weeks or so before they would get any patents." (*Id.*) The "authority" mentioned was a telegram, dated October 26, 1923, from the Assistant Commissioner to the Allotting Agent stating:

> "No objection to Indians preparing their respective allotment selections for crops if properly listed on schedule." [R. 524.]

These Indians did occupy and improve their respective allotment selections, expending thereon labor and money in accordance with the instructions thus given to the Allotting Agent.

Under the facts and circumstances shown by the record, and only briefly summarized herein, equitable title to the lands allotted to them, respectively, under the proceedings had in 1923 became vested in Francisco Arenas and

Simon Arenas, and the Secretary of the Interior, by failing to act, or even by attempting to act adversely, cannot lawfully deprive them, or petitioner as their heir at law and next of kin, of such title or trust patents to the lands so allotted. (See *Smith v. Bonifer*, 154 Fed. 883, 887; *Wyoming v. United States*, 255 U. S. 489; *Payne v. New Mexico*, 255 U. S. 367; *Payne v. Central P. R. Co.*, 255 U. S. 228; *Raymont Bear Hill*, 52 Land Dec. 688, 690; *Parr v. United States*, 153 Fed. 468; *Thomason v. Wellman & Rhoades*, 206 Fed. 895; *Lytle v. Arkansas*, 9 Howard 314; *Beam v. United States*, 162 Fed. 260; *Barney v. Dolph*, 97 U. S. 456; *Ballinger v. Frost*, 216 U. S. 240; *Millet v. Bilby*, 110 Okla. 241; *Reynolds v. Brooks*, 49 Okla. 188.)

The equitable title and right to trust patents of Francisco Arenas and Simon Arenas under the allotment proceedings had in 1923 were fully recognized by the Department of Indian Affairs and the Allotting Agent in the allotment proceedings of 1927. When the Allotting Agent began the preparation of the 1927 Schedule he discovered that several of the 1923 allottees, including Francisco Arenas and Simon Arenas, had died after the submission of the 1923 Schedule. He thereupon, on March 4, 1927, asked the Department for instructions in respect to the allotments made to these deceased Indians in 1923, stating:

> "The lands allotted to these Indians now deceased have been claimed by such families for many years * * * would it be practicable for the families con-

> cerned to request approval of their own allotments and also those of the relatives now deceased, who had complied with the rule and acquiesced in the selections made at that time? It does not seem that there would be any impropriety in approving allotments where such action is taken." [R. 243.]

To which the Commissioner replied:

> "* * * you are advised that it will not be necessary to obtain the consent of living allottees or prospective heirs of deceased allottees to the approval of selections regularly made for Indians now deceased. In revising the schedule you should include all such selections appearing on the schedule previously submitted, and note the fact of the death of the allottee in the column headed 'remarks.'" [R. 244.]

The Allotting Agent followed the instructions thus given him by the Department. See "1923 & 1927 Schedules of Selections for Allotment of Agua Caliente Indian Reservations," [R. 279], submitted by the Allotting Agent to and approved by the Department.

The Circuit Court of Appeals held that none of the Arenas Indians "acquired any equitable rights under the allotment schedule of June 21, 1923," for the following reasons: (1) because in making selections for them the Allotting Agent "was acting 'on his own'"; (2) because this Court held in *Arenas v. United States,* 322 U. S. at page 426, that "When he selected for those who did not choose for themselves, his schedule was disapproved, and

only for that reason"; and (3) that in *La Roque v. United States,* 239 U. S. 62, 66, this Court established a precedent adverse to the situation presented under the 1923 allotments here in question. We believe the Court erred in so holding.

It has already been shown that the Allotting Agent was not "acting on his own" in making selections for these Indians. His instructions were to make allotments to all Mission Indians entitled thereto under the procedure provided in the General Allotment Act of 1887, as amended and supplemented, and that Act authorized the making of selections by him for Indians failing to select for themselves.

The statement of this Court that the 1923 Schedule was disapproved because the Allotting Agent "selected for those who did not choose for themselves" is not supported by the facts adduced at the trial on the merits. The record does not show any disapproval of the 1923 Schedule, but merely that approval was withheld for certain periods of time, and that finally in January, 1927, that Schedule, for reasons of departmental policy only, was ordered revised.

This Court's decision in *La Roque v. United States,* 239 U. S. 62, is not applicable to the 1923 Schedule under discussion. It was there held that, since La Roque made no selection and since no selection was made for him *during his lifetime,* therefore no allotment could be made to him after his death. In the case at bar, the Allotting

Agent made selections for Francisco Arenas and Simon Arenas while they were yet living, and this fact distinguishes the instant case from the *La Roque* case. There is a strong intimation, however, that a selection could have been made for La Roque during his lifetime, in the following language of this Court:

> "The general allotment Act of 1887, in conformity with which the Chippewa allotments were to be made, after authorizing a survey of the reservation to be allotted, provided for an allotment in severalty of a designated area 'to any Indian located therein,' and then directed that all allotments 'be selected by the Indians, heads of families selecting for their minor children,' and the agents selecting for orphan children, and that 'if any one entitled to an allotment shall fail to make a selection within four years * * * the Secretary of the Interior may direct a selection for such Indian' to be made by an agent."

The recognition of the equitable right and title of Francisco Arenas and Simon to the lands allotted to them in 1923 is further evidenced by testimony of the Allotting Agent as follows:

> "* * * in the case of the 1927 schedule I certified that the work began in 1923 and finished in 1927.
>
> Q. I see. You considered there was a continuation between the two schedules? A. It was all one piece of work.
>
> Q. All one piece of work? A. Yes, sir." [R. 155.]

III.

Under the Facts of This Case the United States Is Estopped to Deny Petitioner's Right and Title to the Lands Allotted in 1923, and Reallotted in 1927, to His Father Francisco Arenas and to His Brother Simon Arenas.

The doctrine of equitable estoppel has been pleaded [R. 9, 14, 19, 24] and should be applied against the United States under the facts shown by the record in this case. Only a brief summary of the facts need be made.

Francisco Arenas and Simon Arenas were of Indian descent and were duly enrolled and recognized members of the Palm Springs Band of Mission Indians. They had all tribal rights, including the right to lands in the Palm Springs Reservation. The appointment and qualification of H. E. Wadsworth as Special Allotting Agent for the Mission Reservation in California and his authority to make allotments under the General Allotment Act, as amended and supplemented, are admitted. In the exercise of his authority, the Allotting Agent caused the lands of the Palm Springs Band of Mission Indians to be surveyed and plotted into tracts of two acres, five acres, and forty acres, respectively, and in 1923 requested all adult members of said Band to make selections for allotments. Francisco Arenas and Simon Arenas failed to make selections, and the Allotting Agent made selections for them, including therein the lands previously occupied and used, respectively, by them. These selections were included in the 1923 Schedule which was certified and transmitted by the Allotting Agent to the Commissioner of Indian Affairs, who approved and transmitted it to the Secretary of the Interior. Meanwhile, and on June 21, 1923, the

Allotting Agent issued certificates of selection for allotments to these Indians, and soon thereafter was authorized by the Department to notify and did notify them that the issuance of certificates was evidence of their right to possess, use and improve the lands allotted to them, and of their right to trust patents thereto, and thereafter said allottees expended considerable sums in erecting improvements thereon. At no time prior to their deaths were said allottees informed that trust patents would not issue to them. In 1927 the Department recognized the validity of the 1923 allotments to these Indians, and authorized the Allotting Agent to include said allotments in the revised Schedule of 1927. The Allotting Agent included said alllotments in the 1927 Schedule, certified and transmitted it to the Department of Indian Affairs, and the Commissioner approved and transmitted that Schedule to the Secretary of the Interior, who took no action thereon until December 14, 1944, when he allegedly disapproved it. These facts establish adequate grounds to estop the United States from denying the equitable right of petitioner, as heir at law and next of kin of Francisco Arenas and Simon Arenas, to trust patents for the lands allotted to them in 1923.

Equitable estoppel is defined in 31 C. J. S. 236, Section 59 of Estoppel, as follows:

> "Equitable estoppel or estoppel by misrepresentation is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations, or admissions, *or even by silence when it is his duty to speak,* intentionally or through culpable negligence induces another to believe that cer-

tain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts." (Italics ours.)

The doctrine, as thus defined, may in a proper case be invoked against the United States. See 31 C. J. S. 411, Section 140 of Estoppel, where it is said:

> "It has been broadly stated that there can be no estoppel against the United States or a State. Nevertheless, subject to limitations and exceptions considered *supra* section 138, it is well established that in a 'proper case' the doctrine of equitable estoppel may apply as against the federal and state governments, and that under circumstances which would estop a private individual an estoppel may be asserted against the United States, a state, or a state agency, commission, or officer."

See, also, *United States v. Standard Oil Co. of California*, 20 F. Supp. 427, 452; *United States v. Stinson*, 125 Fed. 907; *Id.* 197 U. S. 200; *State of Iowa v. Carr*, 191 Fed. 257.

The exception to the rule is, that the United States may not be estopped by, or because of, the *unauthorized* acts of its officers and agents. (*Utah Power & Light Co. v. United States*, 243 U. S. 389; *Yuma Water Ass'n v. Schlect*, 262 U. S. 138.) The exception cannot apply to the case at bar, since the acts constituting estoppel were fully authorized.

The authorized acts, statements and representations of the Allotting Agent, which were relied and acted upon by Francisco Arenas and Simon Arenas and by their heir at law and next to kin to their detriment, the failure of

the Secretary of the Interior to act upon the 1923 Schedule, and his silence, for more than twenty years, when it was his duty to act and speak, constitute ample grounds for invoking estoppel, and it is submitted that by reason thereof the United States is estopped to deny petitioner's equitable title and right to trust patents to the lands allotted in 1923, and realloted in 1927, to Francisco Arenas and Simon Arenas.

Your petitioner presents to this Court and files herewith a duly certified transcript of the entire record of the case, as the same appears in the Circuit Court of Appeals for the Ninth Circuit.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court to the Circuit Court of Appeals for the Ninth Circuit, to the end that the portion of the judgment of said Circuit Court of Appeals herein complained of may be reviewed by this Honorable Court.

LEE ARENAS, *Petitioner,*

By JOHN W. PRESTON,
OLIVER O. CLARK,
Attorneys for Petitioner.

APPENDIX.

General Allotment Act as Amended by the Act of 1910.

The General Allotment Act (24 Stat. L. 388), as amended by the Act of June 25, 1910 (36 Stat. L. 859) is codified in Title 25 U. S. C. A., Sections 331, 332 and 333, as follows:

"Section 331. Allotments on reservations; irrigable and nonirrigable lands. In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and

four times the number of acres of nonirrigable grazing land: *Provided,* That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided, further,* That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein with the consent of the Indians expressed in such manner as the President in his discretion may require.

"Section 332. Selection of allotments. All allotments set apart under the provisions of section 331 to 334, inclusive, and 336 shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under said sections: *Provided,* That if any one entitled to an allotment shall fail to make a selection with-

in four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner."

"Section 333. Making of allotments by agents. The allotments provided for in sections 331 to 334, inclusive, and 336 shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office."

Mission Indian Act.

The act of January 12, 1891 (Ch. 65, 26 Stat. 712), omitting caption, provides in part as follows:

"Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior . . .

"Sec. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: . . .

"Sec. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows:

. . .

"Sec. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . ."

Act of March 2, 1917.

The Mission Indian Act was amended by the act of March 2, 1917 (39 Stat. 969, 976) as follows:

"Provided, That *the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California,* in areas as provided in section seventeen of the Act of June twenty-five, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen): Provided, That this act shall not affect any allotments heretofore patented to these Indians." (Italics ours.)

Act of February 14, 1923.

The Act of February 14, 1923, Ch. 76, 42 Stat. 1246 (Title 25 U. S. C. A., Section 335) extends the General Allotment Act to the Mission Indians, *inter alia,* as follows:

"That unless otherwise specifically provided, the provisions of the . . . (General Allotment Act), as amended, be and they are hereby, extended to all lands heretofore purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians."

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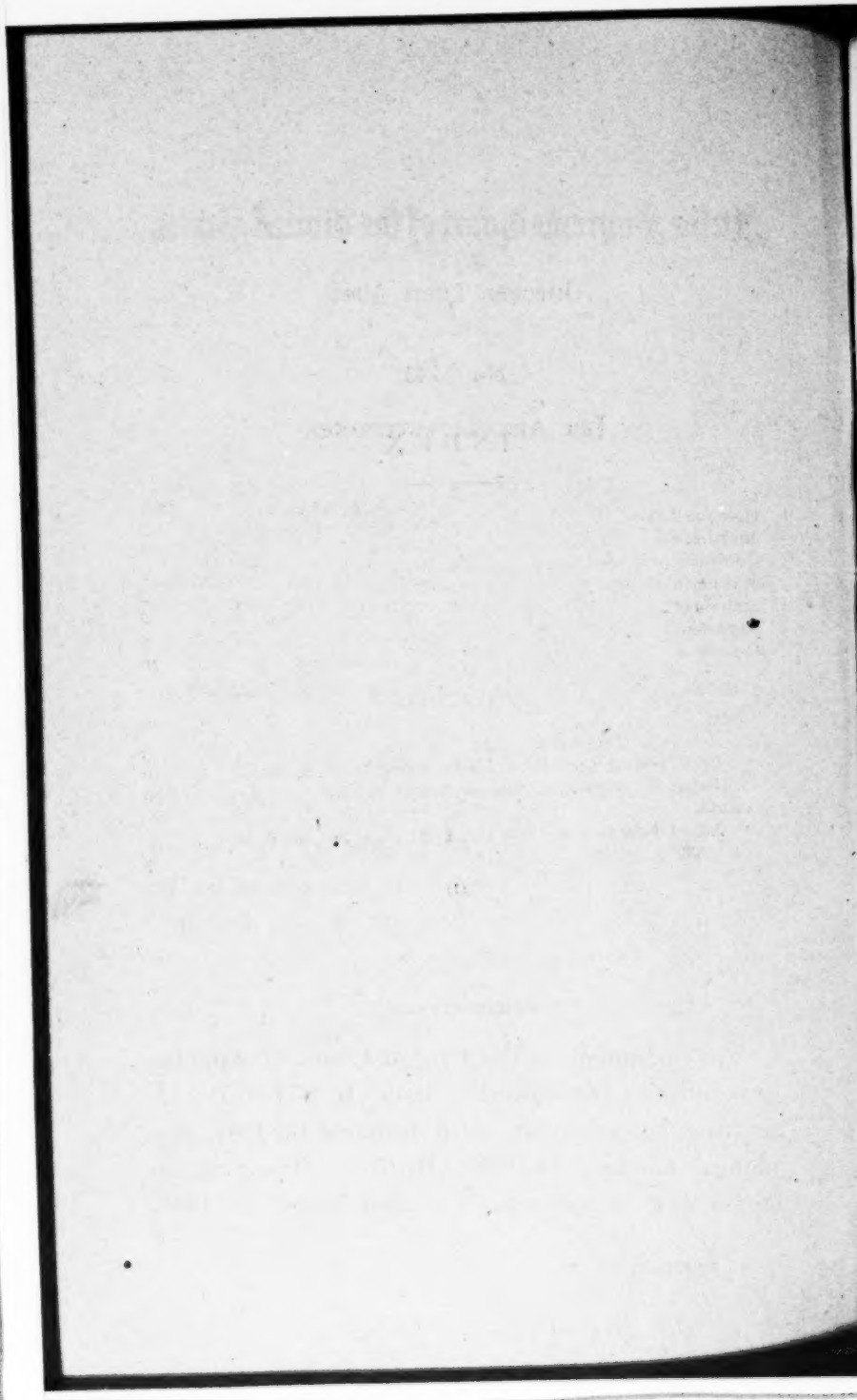

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1141

LEE ARENAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported in 60 F. Supp. 411. The opinion of the Circuit Court of Appeals (R. 612–674) is reported in 158 F. 2d 730. The parts thereof which are here pertinent are at R. 666–672.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 12, 1946 (R. 674–675). A petition for rehearing, filed January 13, 1947, was denied January 14, 1947 (R. 675). The petition for a writ of certiorari was filed March 19, 1947.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the instructions pursuant to which an employee of the Department of the Interior allotted lands on the Palm Springs Reservation of the Mission Indians authorized him to select allotments for Indians who refused to choose for themselves.

2. Whether as a result of unauthorized acts of an agent upon which no reliance was put, the United States is estopped from denying the invalidity of what the agent tried to accomplish.

STATUTE INVOLVED

The pertinent parts of section 2 of the Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. 332, are set forth in the Argument (p. 7, *infra*).

STATEMENT

On March 27, 1923, the Commissioner of Indian Affairs authorized H. E. Wadsworth to allot the lands of the Agua Caliente or Palm Springs Reservation of the Mission Indians (R. 412–413). He directed Wadsworth to act under instructions (R. 391–395) which provided (R. 393): "The allotments * * * will be made under the provisions of the Act of Congress of February 8, 1887 [24 Stat. 388], as amended by the Act of

June 25, 1910 [36 Stat. 855], and supplemented by the Act of March 2, 1917 [39 Stat. 969, 976]." The instructions further provided (R. 394): "Each Indian who has reached the age of discretion should be permitted to select his own allotment, but the selections for minors may be made by the parents, if living, or by some other person whom you regard as competent to do so. Selections for orphans should be made by you."

Francisco Arenas and Simon Arenas were adult members of the Palm Springs Band (R. 72–73, 77). They protested against allotments (R. 176). And, because they refused to make selections, Wadsworth (to adopt the expression he used at the trial) "arbitrarily" selected for them lands on which they were living (R. 172).[1] On June 21, 1923, he prepared and forwarded to Washington a schedule of the purported allotments (R. 63, 65).

Wadsworth also issued to each Indian a certificate which recited that the Indian had selected the land picked out for him (R. 180, 183). Simon Arenas refused to accept delivery of the certifi-

[1] The Circuit Court of Appeals observed (R. 670): "Indeed, the court below, which seems to have been (R. 168, 169) impressed with Wadsworth and his 'good memory', felt compelled to say frankly: 'Special Allotting Agent H. E. Wadsworth, on or about June 21, 1923, evidently being of the opinion that the Indians' likes and dislikes had nothing to do with their receiving their allotments, and that they would be thrust upon them regardless of their wishes in the matter, concluded the preparation of a schedule,' etc. (60 F. Supp. at Page 415)."

cate made out for him (R. 180–181). Francisco Arenas apparently received his certificate but returned it to Wadsworth (R. 179–180). Later, upon receipt of telegraphic advice from Washington that there was no objection to Indians preparing their selected allotments for crops "If Properly Listed on Schedule" (R. 524), Wadsworth told the Indians they had become owners and could improve the properties (R. 74–75, 79). Francisco died October 4, 1924, and Simon February 25, 1925 (R. 73). On and before June 21, 1923, "and at all times subsequent thereto," the lands were nominally improved (R. 74, 78).

The 1923 schedule was never approved. On December 22, 1926 (i. e., after the deaths of Francisco and Simon), the Commissioner of Indian Affairs advised the Secretary of the Interior that five allotment schedules, including the one for the Palm Springs Reservation, were pending (R. 525) and recommended that his office be authorized to revise them "so as to eliminate the names and selections of those Indians who do not desire allotments at this time" (R. 527). The Secretary approved the recommendation (R. 528) and on January 8, 1927, the allotment schedules were returned to Wadsworth with instructions to obtain the written consents of all Indians desiring allotments and to place their names on entirely new schedules (R. 529–531).

Thereafter, Wadsworth informed the Commissioner that several of the Indians had died since

the 1923 schedule was prepared and asked whether heirs could request approval of allotments of "relatives now deceased, who had complied with the rule and acquiesced in the selections made at that time" (R. 243). The Commissioner replied that it would not be necessary to obtain the consent of living allottees to the approval of selections "regularly made for Indians now deceased" (R. 244). Wadsworth included the names of Francisco and Simon Arenas on the schedule he prepared and forwarded to Washington on May 8, 1927.

In 1941, the petitioner brought this suit seeking the award to him of trust patents for allotments selected by him and his deceased wife in 1927 and also for the lands selected by Wadsworth for Francisco and Simon Arenas. At the time suit was brought the Secretary of the Interior had not yet passed on the 1927 schedule. A motion by the United States for summary judgment of dismissal was granted. The Circuit Court of Appeals affirmed. 137 F. 2d 199. This Court granted certiorari, 320 U. S. 733, and on May 22, 1944, reversed the judgment and remanded the cause to the trial court for further proceedings. *Arenas* v. *United States,* 322 U. S. 419.

Thereafter, the Assistant Secretary of the Interior disapproved the 1927 schedule (R. 340). However, after trial the District Court entered

judgment that petitioner was entitled to a trust patent for each of the four parcels, the patents to be effective as of June 21, 1923, the date of the first schedule (R. 90–96). The Circuit Court of Appeals held (R. 666–672) that the four Indians did not acquire any rights under the 1923 schedule because Wadsworth had made the selections for them and he was not authorized to do so and that, since Francisco and Simon Arenas had acquired no rights to trust patents, they were erroneously included in the 1927 schedule which was prepared after their death. Accordingly, so much of the judgment as directed issuance of trust patents for allotments to them was reversed. That part of the judgment in favor of petitioner on account of allotments selected by him and his deceased wife in 1927 was modified to make the patents effective as of May 9, 1927, the date of the second schedule.[2]

ARGUMENT

1. As has been shown (pp. 3–4, *supra*), Francisco and Simon Arenas protested against allotments, refused to make selections and declined to retain certificates issued by Wadsworth stating that they had made selections. Nontheless, petitioner

[2] The greater part of the opinion below (R. 613–665) is devoted to the holding that petitioner was entitled to trust patents for the allotments selected by him and his wife in 1927.

asserts (pp. 9–22) that, by virtue of what Wadsworth did, they acquired a right to have trust patents for the lands in question. He argues (pp. 10–14) that Wadsworth was authorized by his instructions to select allotments for Indians who did not want them. Thus, from the fact that Wadsworth was told that allotments were to be made pursuant to the Act of February 8, 1887, 24 Stat. 388, petitioner infers he was vested with authority which section 2 of that Act empowered the Secretary of the Interior to confer. So far as material that section provides:

> That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, * * *. *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

Thus the proviso of the section empowers the Secretary of the Interior to appoint an agent to

select allotments for Indians who fail to choose for themselves. But the mere existence of the power obviously did not result in its delegation to every subordinate of the Secretary. As the court below held (R. 669) and petitioner seemingly concedes (p. 13), it was necessary for the Secretary to direct Wadsworth to select allotments for Indians who refused to do so. Admittedly, there was no express direction. Petitioner therefore infers that it was given. He draws this inference from the fact that Wadsworth's instructions cite the Act of February 8, 1887, containing the section which provides for it. However, there is no room for inference as to the method by which selections were to be made. The instructions specifically deal with the matter. And, in accord with section 2, they provide that adults should make their own selections. But, although the proviso of section 2 empowered the Secretary to authorize Wadsworth to select for adults who failed to do so, the instructions contain no such authorization. This omission constitutes a denial of the authority, which is quite as plain as an express refusal thereof. If this were not so, a failure to refuse authority would be deemed a deelgation of it. The court below rightly held that Wadsworth was not authorized to select allotments for Francisco and Simon Arenas.

Since Wadsworth was not authorized to make selections for unwilling Indians, there is no

foundation for petitioner's arguments (pp. 15–18) to the effect that until the 1923 schedule was returned to Wadsworth the attitude of the Department confirmed Wadsworth's authority to make such selections and that the ultimate rejection of that schedule was the result of a change of policy. The assertion (pp. 19–20) that the inclusion in the 1927 schedule of the names of Francisco and Simon Arenas constituted administrative recognition that they had acquired rights to trust patents is premised upon the same error as to Wadsworth's power. Moreover, when regard is had to the correspondence between Wadsworth and the Commissioner of Indian Affairs (see pp. 4–5, *supra*) it is plain that Wadsworth was informed that he could place on the schedule names of deceased Indians whose selections had been "regularly made." Obviously, this did not permit inclusion of selections made without authority. Wadsworth's act in listing the two dead Indians was as erroneous as the selections he had purported to make for them.

2. There is no merit in the assertion (pp. 23–26) that the United States is estopped to deny the rights of Francisco and Simon Arenas to trust patents for the lands selected for them by Wadsworth. As petitioner recognizes (p. 25) "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be

done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Yuma Water Assn.* v. *Schlecht,* 262 U. S. 138, 144. The acts of Wadsworth in selecting lands for these two Indians were done without authority of the Secretary of the Interior. Consequently, there is no basis for a claim that the United States was bound by these Acts nor by subsequent statements or conduct of Wadsworth which might indicate his belief that he had acted lawfully. Furthermore, there is no evidence that the Indians acted or refrained from acting because of anything Wadsworth said or did. Petitioner's intimations (pp. 5, 11, 18, 24) that thereafter they improved the properties are without record support. On the contrary, as the district court found (R. 74, 78), Francisco and Simon Arenas "on the 21st day of June 1923, and for some time prior thereto and at all times subsequent thereto" had made upon the lands improvements of nominal value.

CONCLUSION

So much of the decision of the court below as is here attacked by petitioner is correct and pres-

ents neither a conflict of decisions nor any question of general importance. The petition for a writ of certiorari should therefore be denied.[3]

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
DAVID L. BAZELON,
Assistant Attorney General.
JOHN F. COTTER,
Attorney.

APRIL 1947.

[3] Simultaneously herewith, the Government is filing a conditional cross-petition for certiorari, in the event that the petition herein should be granted, to review that part of the judgment below which holds that Lee Arenas is entitled to trust patents for allotments to himself and his deceased wife.

U. S. GOVERNMENT PRINTING OFFICE: 1947

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. —

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

LEE ARENAS

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

On March 19, 1947, Lee Arenas filed a petition for a writ of certiorari in *Lee Arenas v. United States,* No. 1141, seeking review of that part of the judgment of the Circuit Court of Appeals which held that he was not entitled to trust patents for allotments to Francisco and Simon Arenas. A brief in opposition to the foregoing petition is being filed by the Government.

The Acting Solicitor General on behalf of the United States prays that, in the event the Court grants the petition for writ of certiorari in No. 1141, but only in that event, a cross-writ of certiorari be issued to the Circuit Court of Appeals to review that part of the judgment which holds that Lee Arenas is entitled to trust patents for

allotments to himself and his deceased wife. The certified transcript of record filed in No. 1141 includes those portions of the record upon which this cross-petition is based.

OPINIONS BELOW

The opinion of the District Court is reported in 60 F. Supp. 411. The opinion of the Circuit Court of Appeals (R. 612–674) is reported in 158 F. 2d 730.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 12, 1946 (R. 674–675). A petition for rehearing, filed by Arenas on January 13, 1947, was denied January 14, 1947. On February 28, 1947, Mr. Justice Douglas extended the time within which the United States might file a petition for certiorari to May 10, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in passing upon allotments provided for by the Mission Indian Act the Secretary of the Interior is required to approve selections which are legally unobjectionable even if they result in unfair apportionment of available lands among those entitled to share therein.

2. Whether in disapproving a schedule of al-

lotments of land on the Agua Caliente or Palm Springs Band of Mission Indians the Secretary committed an abuse of discretion.

STATUTES INVOLVED

The pertinent provisions of the Mission Indian Act approved January 12, 1891, 26 Stat. 712, and of the Act of March 2, 1917, 39 Stat. 969, 976, are set forth in the Statement below.

STATEMENT

Section 4 of the Mission Indian Act, approved January 12, 1891, 26 Stat. 712, provides that "whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary * * * may cause allotments to be made to such Indians, out of the land of such reservation," in specified quantities.[1] Section 5 of the Act declares:

> That upon the *approval* of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect

[1] The Act of March 2, 1917, 39 Stat. 969, 976 "authorized and directed" the Secretary of the Interior to cause allotments to be made to the Mission Indians pursuant to sec. 17 of the Act of June 25, 1910, 36 Stat. 859, rather than as provided in section 4 of the Mission Indian Act.

> and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *. [Italics supplied.]

On May 9, 1927, H. E. Wadsworth, an employee of the Department of the Interior, transmitted to the Department a schedule of 24 allotments of land on the Agua Caliente or Palm Springs Reservation of the Mission Indians (R. 66–67). Each allotment included three kinds of land: a two-acre town lot; five acres of irrigable land, and 40 acres of desert land. Among those on the schedule were Lee Arenas and his wife who had made their own selections and Francisco and Simon Arenas whose selections had been made for them in 1923 by Wadsworth and who had died before the 1927 schedule was prepared.

In 1936, the schedule not having been approved, certain members of the band sued to compel issuance of trust patents to 13 of the allotments contained in the schedule. The trial court dismissed the suits, 24 F. Supp. 237, and the Circuit Court of Appeals affirmed. *St. Marie* v. *United States,* 108 F. 2d 876. It held that until the Secretary of the Interior approved the selections, no right to allotments vested in the Indians. This Court denied a petition for certiorari because it was filed out of time. 311 U. S. 652.

Thereafter, Lee Arenas, who had not been a party to the *St. Marie* litigation, commenced this suit seeking the same relief. He sued to compel issuance to him of trust patents for the selections made by him and his wife (who had died in 1937) and for the selections made by Wadsworth for Francisco and Simon Arenas. The trial court entered a summary judgment of dismissal and the Circuit Court of Appeals, following its decision in the *St. Marie* case, affirmed. 137 F. 2d 199. This Court, however, granted certiorari, 320 U. S. 733, and, on May 22, 1944, reversed the judgment and remanded the case to the district court for further proceedings. *Arenas* v. *United States,* 322 U. S. 419.

Under date of December 13, 1944, the Commissioner of Indian Affairs recommended that the Secretary of the Interior disapprove the schedule (R. 303–340). The recommendation rested on five reasons. The first was that, if the schedule were approved, only a minority of the band would receive allotments. Thus, three had died before the 1927 schedule was prepared and 13 were foreclosed by the *St. Marie* decision. Only eight, therefore, of the approximately 50 members of the band would receive allotments under the schedule. (R. 327–331.) The second reason was that the schedule did not represent a proper exercise of the allotment policy. That policy contemplated that each Indian should be provided

with sufficient land to enable him to earn a living from his labor thereon. However, the land allotted was inadequate for this purpose. The 40-acre tracts were worthless for agriculture. Because of the small amount of theoretically irrigable land on the reservation five-acre tracts of such land could not be provided for all the Indians. The two-acre lots were too valuable for business purposes to be used for agriculture. (R. 331–333.) As a third reason for disapproval, the Commissioner pointed out that the selections were not of equal value. Though worthless for agriculture, five of the 40-acre tracts were in 1923 valued at $800.00 an acre or $32,000.00 each while the remainder possessed only nominal value. The five-acre tracts and the two-acre lots necessarily varied in value according to their proximity to the city of Palm Springs and its business district. (R. 333–335.) In the fourth place, Section 14, from which the two-acre lots were taken, was too valuable as a unit to be divided up. Located in the heart of the city and only a block from the business district, it would realize much more if it were sold or leased as a unit. On the other hand, the development of what would be left of the section after approval of the schedule would be seriously hampered; the presence of individual owners with their choice locations would be a fruitful source of controversy within the band. (R. 335–338.) Finally, the Commissioner said,

approval of the schedule and consequent allotment of the choicest areas would make it impossible to give equally valuable allotments to the remaining members of the band (R. 338–340).

On December 14, 1944, upon examination and consideration of the Commissioner's letter, the Assistant Secretary of the Interior adopted the Commissioner's reasons and disapproved the 1927 schedule (R. 340).

After a trial at which the Government put in evidence the letter of the Commissioner of Indian Affairs, the trial court entered judgment that Arenas was entitled to a trust patent for each of the four allotments (R. 90–95). The Circuit Court of Appeals reversed that part of the judgment granting trust patents for selections made by Wadsworth for Francisco and Simon Arenas (R. 666–672). It is to review that holding that Lee Arenas has filed a petition for certiorari in No. 1141.[2]

However, the court below affirmed the award to Arenas of trust patents on account of allotments to him and his wife. It held that the Secretary of the Interior could determine whether the land was subject to allotment and the pros-

[2] The holding was that the Indians did not acquire any rights under the 1923 schedule because Wadsworth had made the selections for them and he was not authorized to do so and that, since they had acquired no rights to trust patents, they were erroneously included in the 1927 schedule which was prepared after their deaths (R. 666–672).

pective allottee was eligible, but that once the regularity and the legality of a schedule were established, the Secretary was bound to approve it and to grant trust patents and that he could not refuse to do so on equitable considerations (R. 660–661). It further held that, if the Secretary possessed any discretionary power in passing upon a schedule, he had abused that power in the instant case (R. 661).

REASONS FOR GRANTING THE WRIT

1. In holding that in passing upon allotments for Mission Indians the Secretary of the Interior may not determine whether the allotments equitably apportion the land among those entitled to share therein (R. 661), the court below has laid an undue restraint upon the functions of that officer. While it is clear that the Secretary is empowered to reject proposed allotments because they are not lawful, it does not follow that his authority extends no further. In so limiting the Secretary, the court below relied on *Payne* v. *New Mexico,* 255 U. S. 367, and a decision of the Solicitor for the Department of the Interior, 57 I. D. 16. In the *Payne* case, this Court held that, in passing upon a lieu land selection, the Secretary of the Interior was required to give effect to the conditions existing when the selection was made and that, if it was then valid, it could not be disapproved by reason of a subsequent change in con-

ditions. The Solicitor's ruling (57 I. D. 16) was that the Secretary could not disapprove allotment selections for reasons not related to the merits of the individual selections. Neither ruling involved the question of the Secretary's power to prevent unequal or inequitable allotments. Neither, therefore, warrants the view that, in the case of the Mission Indians, the Secretary was compelled to approve allotments which, as pointed out by the Commissioner, were unfair as between allottees and which would make impossible an equal division of lands among those entitled to share in them. Indeed when reference is had to the reasons which persuaded the Secretary, it is hard to see how, short of an express statutory prohibition, he could be denied the power to prevent the unfortunate consequences which would result from approving this schedule.

2. In holding that the Secretary's disapproval of the schedule constituted an abuse of discretion (R. 661), the court below reached a conclusion which is without support in the record. There is no foundation for the court's view that the Secretary was guilty of neglect and inordinate delay in acting on the schedule. The Secretary construed the statute as giving him discretion to withhold action on a schedule. This construction was sustained in the *St. Marie* litigation and was not overturned until May 1944 when this Court reversed the Circuit Court of Appeals. In December 1944, the Secretary disapproved the

schedule. Plainly, the Secretary was justified in relying on the construction of the statute enunciated in the *St. Marie* case. It is equally plain that he acted promptly thereafter. As a further basis for its conclusion, the court below has assailed as "specious and colorable" the reasons assigned by the Secretary. The opinion contains nothing to support this characterization. Nor does the record. Seemingly, it rests upon the view that the Commissioner of Indian Affairs was opposed to the policy of allotments. (See R. 629, 632, 647.) It is submitted, however, that, even if this were so, it falls far short of demonstrating the want of substance in the reasons given by the Commissioner and affords no warrant for holding that, in disapproving the schedule because of those reasons, the Secretary committed an abuse of discretion. We do not construe this Court's opinion in *Arenas* v. *United States,* 322 U. S. 419, as denying the Secretary authority to disapprove allotments on such grounds.

CONCLUSION

For the reasons stated, and on the condition that the petition in No. 1141 is granted, it is respectfully submitted that this cross-petition for a writ of certiorari be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

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